United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2183

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter

—of—

ANONYMOUS, AN ATTORNEY ADMITTED TO PRACTICE IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND JOHN G. BONOMI, CHIEF COUNSEL, COMMITTEE ON GRIEVANCES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

SAUL FRIEDBERG
Attorney for Defendants-Appellees The Association of the Bar of the City of New York and John G. Bonomi
36 West 44th Street
New York, New York 10036

FILED
DEC 12 1974

TABLE OF CONTENTS

PAGE

Table of Cases Cited

APPENDIX PAGE*

Table of Necessary Statutes

* References are to Appendix to Brief for Defendants-Appellees.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2183

In the Matter

—of—

ANONYMOUS, AN ATTORNEY ADMITTED TO PRACTICE IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND JOHN G. BONOMI, CHIEF COUNSEL, COMMITTEE ON GRIEVANCES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

Issues Presented for Review

1. Was it error for the District Court to dismiss suit for declaratory relief and to enjoin the defendants from continuing an attorney-disciplinary proceeding pending before the Committee on Grievances of defendant The Association of the Bar of the City of New York on the basis of the doctrine of federal court abstention as enunci-

ated in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Erdmann* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972).

2. Is said Committee on Grievances, in an attorney-disciplinary proceeding pending before it, barred by the Fifth and Fourteenth Amendments to the Constitution of the United States from receiving in evidence against the attorney a transcript of testimony given by him before a New York County Grand Jury after a grant of immunity?

STATEMENT OF THE CASE

Preliminary Statement

Plaintiff brought this action June 4, 1974 in the United States District Court for the Southern District of New York for declaratory and injunctive relief to prevent defendants from using testimony given by him to a New York County Grand Jury under a grant of immunity in an attorney-disciplinary proceeding pending before the Committee on Grievances of defendant The Association of the Bar of the City of New York (hereinafter the "Grievance Committee"). Plaintiff contends that such use would violate his rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff moved for a preliminary injunction and defendants cross-moved for judgment dismissing the complaint for failure to state a claim on which relief can be granted. Both motions were heard July 3, 1974 and on July 31, 1974 the District Court, Hon. Thomas P. Griesa, J., handed down its Opinion and Order denying plaintiff's motion, granting defendants', and dismissing the complaint.

The District Court did not reach the constitutional issue but dismissed the complaint pursuant to the doctrine of federal court abstention following the decision of this Court in *Erdmann* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972), and the decision of the Supreme Court in *Younger* v. *Harris*, 401 U.S. 37 (1971).

Plaintiff has appealed here.*

The Relevant Facts

On October 18, 1968, appellant, an attorney-at-law admitted to practice in New York, was called to testify before a New York County Grand Jury. 10a. Before testifying he was granted immunity in the following language:

> "The granting of immunity means you cannot be prosecuted for any State violation as a result of your testimony here today or documents that you may have produced here today. However, you can be prosecuted for the crime of perjury, or if you lie to this Grand Jury, tell the Jury something that is not truthful, and for the crime of contempt, if you refuse to answer a question, a legal, proper and relevant question, or if you give an answer that can be deemed to be evasive.
>
> * * *
>
> "I remind you that immunity is still in effect and I also caution you that if this Grand Jury believes that you are avoiding or attempting to avoid giving answers to the questions or deliberately avoiding giving answers to questions, that you can be charged with contempt

* Further proceedings by defendants are stayed by a District Court order pending the argument and determination of this appeal.

for that; and if you lie to this Grand Jury, that you can be charged with the crime of perjury.

• • •

"As I explained before, those are the only two State crimes that you can be charged with as a result of your testimony here today or documents that you produce here. . . ." 11a.

He then testified before the Grand Jury October 18, November 15 and November 21, 1968. 11a.

On February 4, 1971 a Justice of the Supreme Court, New York County, made an order authorizing the District Attorney of New York County to release the minutes of plaintiff's said testimony (and other minutes) to the Grievance Committee. 45a. Said minutes, consisting of some 1500 pages (103a), were delivered to the Grievance Committee in March, 1971. 21a.

On January 11, 1973, counsel to the Grievance Committee wrote plaintiff requesting that he appear at the Grievance Committee to discuss possible professional misconduct by him (46a), in response to which request plaintiff, with the advice of his own counsel, submitted a written statement to the Grievance Committee in which he "in substance, provided all the information contained in his . . . Grand Jury testimony." 22a.

On May 31, 1973, counsel for the Grievance Committee "instituted a disciplinary proceeding against plaintiff by duly serving upon him a notice containing the charge levied against him" to which "plaintiff submitted an answer . . . substantially admitting the facts as set forth by counsel for the Committee on Grievances." 22a.

A hearing was held before a panel of the Grievance Committee June 21, 1973 at which plaintiff was present with counsel. The Grand Jury minutes containing plaintiff's said testimony were offered and accepted in evidence without objection by plaintiff. The panel sustained the charges and recommended that the matter be brought to the attention of the Appellate Division of the New York Supreme Court, First Department, for such action as that court deemed proper. 23a.

Thereafter plaintiff obtained new counsel (37a) who requested a new hearing on a number of grounds, including the claim that the use of the Grand Jury minutes violated plaintiff's constitutional rights. 21sa-24sa. His application for a new hearing was granted. 23a.

On April 16, 1974 a new charge letter was sent to plaintiff on which a hearing was held May 7, 1974. The Grand Jury minutes were offered in evidence, and, over plaintiff's objection, were received and the hearing was adjourned to June 4, 1974 without being completed and without any decision having been made by the panel. 12a.

On June 4, 1974 plaintiff commenced the present action by the filing of the complaint and a motion for a preliminary injunction (2a) and obtained an order staying further proceedings by defendants until the hearing and determination of his motion for a preliminary injunction (8a-9a), which stay has been continued pending the hearing and determination of the present appeal.

This federal court intervention occurred at a stage in the proceeding when it was impossible to tell what the outcome would have been, and whether the proceeding would have resulted in any damage to plaintiff. It occurred on

a ruling by the Grievance Committee on evidence it would consider and before any decision by the Grievance Committee, before the matter was referred to the Appellate Division for action, if such would have been the decision of the Grievance Committee, before the appointment of a referee by the court, if it would have decided to appoint a referee, before any offer of evidence to the referee or any ruling by him on such offer, before the referee's report, before any action by the Appellate Division thereon, and before any appellate determination in the New York court system and through *certiorari* to the United States Supreme Court.

It also occurred before the trial and determination in the state court of various factual issues which might affect the outcome, for example, the nature and extent of any possible commitment by the state to plaintiff as a result of the words used in granting immunity, and the possible waiver of immunity by plaintiff, by reason of his written statement to the Grievance Committee and his non-objection at the June 21, 1973 hearing to the admission of the Grand Jury minutes.

Defendants cross-moved to dismiss the complaint and on July 31, 1974 the court below made the Opinion and Order appealed from denying plaintiff's motion, granting defendants', and dismissing the complaint.

ARGUMENT

POINT I

The District Court Correctly Dismissed the Complaint on the Basis of the Federal Court Abstention Doctrine.

The District Court's decision was beyond question compelled by *Younger* v. *Harris,* 401 U.S. 37 (1971) and by this Court's opinion in *Erdmann* v. *Stevens,* 458 F. 2d 1205 (2d Cir. 1972), *cert. denied,* 409 U.S. 889 (1972).

Plaintiff raises various arguments in an attempt to avoid this inevitable result.

1. Plaintiff argues that *Erdmann* is made inapplicable here by *Gibson* v. *Berryhill,* 411 U.S. 564 (1973), citing in support the dissent of Judge Oakes in *Tang* v. *Appellate Division of New York Supreme Court, First Department,* 487 F. 2d 138 (2d Cir. 1973). In making this argument, plaintiff fails to mention *Geiger* v. *Jenkins,* 401 U.S. 985 (1971), *affirming* 316 F. Supp. 370 (D.C. Ga. 1970).

In *Geiger,* which is in many important ways identical with the case at bar, the Georgia State Board of Medical Examiners served a written notice on the plaintiff, Geiger, a physician, charging him with conduct which might constitute grounds for the suspension or revocation of his license to practice medicine. A hearing was set before the Board for March 1[illegible] 1970. On March 10, 1970, Geiger commenced an action in District Court for declaratory relief and to enjoin the Board from proceeding on constitutional grounds, alleging that the evidence against him had been illegally obtained. A three-judge District Court dismissed the action on the ground that the Board proceedings were

"judicial in nature" (316 F. Supp. at 372) and that, therefore, the federal court abstention doctrine applied. On direct appeal the Supreme Court affirmed without opinion on the authority of *Younger, Samuels* v. *Mackell,* 401 U.S. 66 (1971) and *Fernandez* v. *Mackell,* 401 U.S. 66 (1971).

The Supreme Court commented on *Geiger* in *Gibson* v. *Berryhill, supra.* In distinguishing the situation in *Gibson* from that in *Geiger,* the court said:

> " . . . it is apparent from Geiger that administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings." 411 U.S. at 576-577.

The basis for the decision in *Gibson* v. *Berryhill* was the fact that the members of the Board of Optometry had a substantial financial interest in revoking the license of the plaintiff therein, the three-judge District Court having therefore found that "the administrative process was so defective and inadequate as to deprive plaintiffs of due process of law" (411 U.S. at 570), and it having been claimed "that the administrative body itself was unconstitutionally constituted" (411 U.S. at 577).

If, as held in *Geiger,* proceedings before a state administrative board handling the discipline of physicians are proceedings to which the federal court abstention doctrine applies, the doctrine must apply with much greater strength to attorney-disciplinary proceedings. The admission of attorneys to practice, the governance of attorneys in practice, and the disciplining of attorneys lie solely in the hands of the state court and are state court functions. Judiciary Law of New York, sections 90.1, 90.2 and 478. Hence, fed-

eral court intervention in New York attorney-disciplinary proceedings is, by definition, intervention in the functioning of the state judicial system.

In *Younger,* the court said that the federal court abstention doctrine arises out of "a proper respect for state functions . . . a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" (401 U.S. at 44).

This being the source of the doctrine, there is no area requiring its application more than the area of attorney discipline which is, uniquely and from beginning to end, a state judicial function. This was clearly recognized by this Court in *Erdmann.* In his concurring opinion in that case, Judge Lumbard expressed the following views:

> "While these principles [the principles of federal abstention stated in *Younger*] were stated in cases involving state criminal proceedings, I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar. The state 'has a legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law.' *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 7, 91 S. Ct. 702, 706, 27 L. Ed. 2d 639 (1971). Indeed the state's responsibility in these matters is primary. A lawyer to practice anywhere in the United States must first be admitted to the bar of one of the states. In New York, as in all of the states, the proper functioning of the judicial system depends upon the competence and integrity of the members of the bar and their compliance with appropriate standards of professional re-

sponsibility. Thus, when state courts do initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the state and its citizens that federal courts should be as slow to intervene in these proceedings as in state criminal proceedings."

" . . . withholding of relief on grounds of comity demands an analysis of the state and federal interests involved and not mere labelling of a proceeding as 'administrative' or 'judicial.'" 458 F. 2d at 1213 and *ib.* n. 3.*

It is true that Judge Oakes said, in a footnote to his dissenting opinion in *Tang* v. *Appellate Division of N.Y. Supreme Court, First Dept., supra* (at p. 146 n. 4), that "application of the doctrine of 'comity' in the disciplinary context in *Erdmann* is open to dispute . . . in view particularly of the Supreme Court's recent decision in *Gibson* v. *Berryhill*. . . . " It is respectfully submitted that Judge Polk misreads *Gibson* v. *Berryhill,* and that, in any event, this dictum is not here controlling and should not be followed.

It needs further to be noted that, in denying a stay of the pending state court proceedings in *Cousins* v. *Wigoda,* 409 U.S. 1201, 1205 (1972), Mr. Justice Rhenquist said:

"While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal

* The Courts of Appeals for the Fourth, Fifth and Seventh Circuits have held that "application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal,' but rather should be governed by analysis of the competing interests that each case presents." *Palaio* v. *McAuliffe,* 466 F. 2d 1230, 1232-1233 (5th Cir. 1972); see also *Lynch* v. *Snepp,* 472 F. 2d 769 (4th Cir. 1973); *Cousins* v. *Wigoda,* 463 F. 2d 603 (7th Cir. 1972).

comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters."

2. Plaintiff also argues, on the basis of *Steffel* v. *Thompson*, 415 U.S. 452 (1974) and *Allee* v. *Medrano*, —— U.S. ——, 94 S. Ct. 2191 (1974), that even if injunctive relief be barred, he is still entitled to maintain his action for a declaratory judgment. This argument also is erroneous.

In *Younger* v. *Harris* it was held that where a state proceeding is pending of such nature as to bar injunctive relief, declaratory relief is barred as well. This rule was followed in *Samuels* v. *Mackell, supra,* and, accordingly, in the case at bar, where a state proceeding bars injunctive relief, declaratory relief is barred as well.

Steffel and *Allee* do not change this situation. They simply stand for the proposition that where no state proceeding barring injunctive relief is pending, federal court abstention cannot be invoked to bar declaratory relief.

3. Plaintiff also argues that *Erdmann* applies only where the disciplinary proceeding has actually reached the court, whereas at bar the proceeding is still in the Grievance Committee stage, which is a distinction without a difference. As the District Court here recognized, a proceeding before the Grievance Committee is a judicial proceeding entitled to the full respect of the federal abstention rule.

Among the first to recognize this fact was plaintiff. In his Reply Affidavit verified July 2, 1974 in support of the motion for a preliminary injunction, plaintiff's attorney correctly stated:

"By virtue of Section 90 of the New York Judiciary Law and Rule 603.12 of the Rules of the Appellate

> Division, First Department, the Committee on Grievances of the Association of the Bar of the City of New York is the administrative arm of the State Court in connection with the prosecution and discipline of attorneys." 39a.

Plaintiff's concession is in accord with the clear principles of New York law on this point.

For many years the Appellate Division, First Department, has used the Grievance Committee, which has offices and a staff for this purpose (2sa), as its investigative and prosecuting agent to assist it in the performance of its duties under Section 90.2 of the Judiciary Law. See *Wiener* v. *Weintraub,* 22 N.Y. 2d 330, 331 (1968). As a result, "In the investigation of . . . complaints [charging professional misconduct] and in the conduct of such [disciplinary] proceedings, . . . the bar association's Grievance Committee acts as a quasi-judicial body and, as such, is an arm of the Appellate Division." (*Id.*) Hence, "a proceeding before [the Grievance Committee] constitutes a 'judicial proceeding . . . ' Quite clearly, the filing of [a] complaint [with the Grievance Committee against an attorney] . . . initiate[s] . . . a judicial proceeding" (*id.*), the purpose of which is to determine whether the attorney involved has been guilty of conduct proscribed by Section 90.2 of the Judiciary Law, and if so what discipline to impose. See also, *Matter of Branch,* 178 App. Div. 585 (1st Dept. 1917). Most recently, in *Matter of Lincoln Rochester Trust Company,* —— N.Y. 2d ——, March 27, 1974, Judge Breitel pointed out that organizations such as the Grievance Committee have been used "by the courts in the control of conduct in the profession (see, e.g., *Matter of Bar Association of the City of New York,* 222 App. Div. 580)."

The federal courts are in accord. In *Doe* v. *Rosenberry*, 255 F. 2d 118 (2d Cir. 1958) this Court expressly held that an attorney-disciplinary proceeding before the Grievance Committee is a judicial proceeding, part of the state judicial process.

4. Finally, plaintiff contends that the federal court abstention doctrine is inapplicable because of alleged "bad faith and . . . other extraordinary circumstances."* In making this contention, plaintiff misapplies the rule enunciated in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

In that case, the court said that the abstention doctrine does not apply where the state proceedings are not instituted "with any expectation of securing valid convictions, but rather are part of a plan . . . to harass appellants" (380 U.S. at 482) in their exercise of constitutional rights. On the other hand, the court pointed out, if the state proceeding is brought lawfully and in good faith, the incidental injury to the person prosecuted is not a basis for federal intervention. *Ib.*, p. 489.

This was reiterated in *Younger* v. *Harris, supra*. There, in applying the abstention doctrine, the court pointed out that the injury "Harris faces is solely 'that incidental to every criminal proceeding brought lawfully and in good faith'" (401 U.S. at 49) and hence Harris could not maintain his federal suit even if the state prosecution appeared on its face violative of his constitutional rights.

Here there is no suggestion that the proceeding by the Grievance Committee was instituted for any reason other than for the *bona fide* purpose of securing a court determination of whether plaintiff should be disciplined under Sec-

---

* Appellant's Brief, p. 21.

tion 90.2. Even were it admitted, which of course it is not,* that the Grievance Committee use of plaintiff's compelled testimony contravened his constitutional rights, he still would be compelled to try and to appeal the matter through state channels.

It should be emphasized that, the Grievance Committee proceeding having been aborted, it is impossible to tell, except by inadmissible conjecture, that any injury would have been done plaintiff had it continued. There is no way of knowing that the Grievance Committee would have decided to recommend referral of the matter to the court, that the Executive Committee of the Bar Association would have approved such a recommendation,** that the court would have acted on the Bar Association petition by appointing a referee, that the referee would have admitted the Grand Jury minutes in evidence and rendered an unfavorable report, or that the court would have confirmed such unfavorable report and disciplined plaintiff.*** Nor is there any way of knowing how the factual issues mentioned in the statement of the case would be resolved in the state courts. In short, plaintiff here seeks federal intervention to bar a state judicial proceeding, in the sensitive area of the relations between the New York courts and New York attorneys, on the conjectural assumption that, if the proceeding runs to a conclusion, the factual issues will be resolved against plaintiff and plaintiff will be found guilty because of the

---

* See Point II, below.

** Such approval is necessary before the matter can be transferred to the court. 18sa.

*** Until it did so, there could not even be any publicity as to the proceedings. Judiciary Law, Section 90.10.

admission of evidence claimed, by application of an uncertain principle, to be constitutionally inadmissible.

Far from this being a case where "extraordinary circumstances" dictate a waiver of the abstention rule, this is a case which uniquely calls for its application.

POINT II

The Receipt in Evidence by the Grievance Committee, in an Attorney-Disciplinary Proceeding Pending Before It, of a Transcript of the Testimony Given by the Attorney to a New York County Grand Jury After a Grant of Immunity, Is Not Barred by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Supreme Court has not directly ruled on the question here presented: whether testimony given by an attorney under a grant of immunity can be used against him in attorney-disciplinary proceedings. However, sound reason and case-law indicate that the affirmative answer given to the question by the New York courts and left undisturbed by the United States Supreme Court is good constitutional law. See *Matter of Zuckerman*, 20 N.Y. 2d 430 (1967), *cert. denied*, 390 U.S. 925 (1968); *Matter of Klebanoff*, 21 N.Y. 2d 920 (1968), *cert. denied*, 393 U.S. 840 (1968) and *Matter of Epstein*, 37 A.D. 2d 333 (1st Dept. 1971), *leave to appeal denied*, 29 N.Y. 2d 487, *appeal dismissed*, 29 N.Y. 2d 875 (1971).

To view the matter in proper prospective, it is necessary to review the direct rulings the Supreme Court has made in this area.

Attorneys, professors, policemen, and sanitationmen cannot be disbarred or subjected to dismissal because they have pleaded or refused to waive their Fifth Amendment rights against self-incrimination. *Spevack* v. *Klein,* 385 U.S. 511 (1966); *Slochower* v. *Board of Education,* 350 U.S. 551 (1956); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r,* 392 U.S. 280 (1968). Nor can a gambler be penalized by governmentally imposed forfeiture of his property for using his privilege against self-incrimination. *United States* v. *United States Coin and Currency,* 401 U.S. 715 (1970).

Testimony given without a grant of immunity, because of the fear of governmentally imposed forfeiture of property or loss of employment were the privilege invoked, cannot be used against the witness in a government suit for forfeiture of property or in a criminal prosecution. *Boyd* v. *United States,* 116 U.S. 616 (1885); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967).

In brief, neither the states nor the United States may penalize a person for his exercise of his Fifth Amendment privilege against self-incrimination; nor may the states or the United States use against a person testimony that has been compelled by fear of a governmentally imposed punishment for the exercise of the privilege.

But neither line of cases determines the question here presented: i.e., can testimony given under a grant of immunity be used in attorney disciplinary proceedings? That question has not been directly answered by the Supreme Court. A guide to the answer may, however, be found in the landmark case of *Ullmann* v. *United States,* 350 U.S. 422 (1956).

In *Ullmann*, the appellant argued that the prohibition in the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself" was absolute and that the privilege could not be erased and his testimony compelled by a grant of immunity under the Immunity Act of 1954, which reads in part: ". . . no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled" to testify.*

Ullmann argued that the grant of immunity given by the Immunity Act was not co-extensive with the privilege. The grant of immunity, Ullmann pointed out, while giving him the protection of the Immunity Act, did not protect him from many other harms which would result from knowledge and use of his testimony "such as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium" (350 U.S. at 430). To this list of "disabilities" other than prosecution, penalty or forfeiture for crime, which might attach to a witness compelled to testify, Mr. Justice Douglas, in his dissent, added: "ineligibility for employment in the Federal Government and in defense facilities . . . , the risk of loss of employment as a longshoreman" (350 U.S. at 440) and, among others, "*exclusion from the bar*" (350 U.S. at 453, emphasis added).

In his reading of the immunity statute, Mr. Justice Douglas found that the grant of immunity did not cover these *side punishments*:

---

* This is identical with the New York statute (Code of Criminal Procedure section 619-c) under which appellant here was granted immunity, which reads in part: "such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which" he testified.

> "But there is no indication that the Immunity Act, 68 Stat. 745, 18 U.S.C. (Supp. II) 3486, grants protection against these disabilities. The majority will not say that it does. I think, indeed, that it must be read as granting only partial, not complete, immunity for the matter disclosed under compulsion." 350 U.S. at 441.

Since, in the view of Mr. Justice Douglas, the immunity granted did not cover the *side punishments,* it was not the equivalent of the privilege and therefore wrongly deprived Ullman of his constitutional privilege against self-incrimination.

The majority felt otherwise, and, in affirming the constitutionality of the immunity statute, the court did so with full awareness of the fact that the compelled testimony might result in a whole variety of *side punishments* to the witness other than criminal prosecution, including "exclusion from the bar." It dealt with the problem in the following words:

> ". . . But, as this Court has often held, the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege: 'The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.' *Hale* v. *Henkel,* 201 U.S. 43, 67. Here, since the Immunity Act protects a witness who is compelled to answer to the extent of his constitutional immunity, he has of course, when a particular sanction is sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 430-431.

Since the court affirmed the constitutionality of immunity as a substitute for the privilege with full knowledge that the compelled testimony might involve various governmentally imposed *side punishments* such as registration and investigation statutes, passport ineligibility, ineligibility for government or defense facility employment and "exclusion from the bar," which, according to Mr. Justice Douglas, were not covered by the immunity statute, it is reasonable to conclude that the Supreme Court would hold that attorney-disciplinary proceedings are not covered by a grant of immunity.

This conclusion is reinforced by *Kastigar* v. *United States*, 406 U.S. 441 (1971), which held that the 1970 use immunity statute, 18 U.S.C. 6002, is co-extensive with the Fifth Amendment privilege against self-incrimination and hence is constitutional. The statute involved provides that "no testimony or other information compelled under the order [to testify] (or other information directly or indirectly derived from such testimony or other information) may be used against the witness *in any criminal case.*" (Emphasis added.) In its opinion in *Kastigar*, the court said (406 U.S. at 453):

> "The statute's explicit proscription of the use *in any criminal case* of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with Fifth Amendment standards. . . . it . . . insures that the testimony cannot lead to the infliction of *criminal penalties* on the witness." (Emphasis added.)

Kastigar makes it evident that the Fifth Amendment's purpose is to protect the witness from prosecution, by means of his own testimony or evidence derived therefrom, "in any criminal case" and not to protect him from the *side punishments,* including professional discipline, envisaged by the witness in *Ullmann.*

Kastigar is in accord with *Brown* v. *Walker,* 161 U.S. 591, 605 (1895), where the court said:

> "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge."

This Court has directly held that an attorney-disciplinary proceeding is not a criminal proceeding nor is its purpose the prosecution or the imposition of a penalty or a forfeiture for a crime; "it is a proceeding designed in the public interest to preserve the good name and the uprightness of the bar, made up, as it is, of attorneys who are public officers." *Doe* v. *Rosenberry, supra,* at p. 120.

Plaintiff's citations of *In re Ruffalo,* 390 U.S. 544 (1968), *Ex parte Garland,* 71 U.S. (4 Wall.) 333 (1867), *Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 277 (1866), *United States* v. *Lovett,* 328 U.S. 303 (1946), and *United States* v. *Brown,* 381 U.S. 437 (1965), are beside the point.

The last four of these cases involved claims that the statutes under attack were bills of attainder or *ex post facto* laws, violative of Article I, section 9 of the United States Constitution. Since a bill of attainder or *ex post facto* law is one which prescribes punishment for the proscribed actions, the court had to determine whether the statutory

consequences, to wit, disbarment, exclusion from federal employment and exclusion from union office, were in fact "punishment" and it held that they were.

There is no question that disbarment is a "punishment" even though the purpose of disbarment is not to punish but to maintain professional standards. However, to say that disbarment is a "punishment" is not to say that a disbarment proceeding is a "criminal case."

Nor does *In re Ruffalo* point to an opposite conclusion. Its holding also is indisputable, i.e., that in a disciplinary proceeding the attorney is entitled to due notice of the charges against him. That would be true regardless of the label applied to the proceeding, whether that label be "quasi-criminal," civil or otherwise.

However, the question, whether testimony given under a grant of immunity can be used in an attorney-disciplinary proceeding, must be decided not in the framework of the mentioned five cases, nor by the substitution of semantics for realities. The problem must be solved by determining whether an attorney-disciplinary proceeding is among the perils against which the privilege against self-incrimination was intended to guard. As has been demonstrated, it is not.

The views of the New York Court of Appeals in this area are entitled to respect. That court has said (*Matter of Zuckerman, supra,* at p. 438):

> "The Fifth Amendment relates to self incrimination on charges of crime. Disciplinary proceedings for professional misconduct are civil in nature (*Matter of Phillies,* 17 A.D. 2d 93, and cases cited; mot. for lv. to app. den. 12 N.Y. 2d 645). It is sufficient protection to

> a lawyer in such a situation that he could not be prosecuted for crime on the basis of disclosures which he might have made in a disciplinary proceeding while *Cohen* v. *Hurley* remained the law. The Fifth Amendment states that no person 'shall be compelled *in any criminal case* to be a witness against himself' (italics supplied). These men have made the disclosures which have contributed to the disciplinary measures which have been imposed upon them. They are not charged with crime. 'The [State] Constitution says that no person "shall be compelled in any criminal case to be a witness against himself" (Const., art. I., sec. 6). A proceeding looking to disbarment is not a criminal case (*Matter of Randel, supra* [158 N.Y. 216]). We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime.' (*Matter of Rouss,* 221 N.Y. 81, 86, Cardozo, J.)"

It is fair to point out that the United States Supreme Court has consistently denied *certiorari* to review the Court of Appeals decisions on the question.

A final word is required as to the rationale of the situation.

If plaintiff's constitutional argument is correct, the result would threaten the undermining of the bar as a guardian of law and justice for it would prevent the bar or the courts from disciplining attorneys who had made public confession of involvement in transactions utterly incompatible with the good character required for hundreds

of years as a requisite to admission to and continuance at the bar. When the Supreme Court held in *Kastigar* that use immunity is a constitutionally adequate substitute for the Fifth Amendment privilege, it did so knowing that immunity does not protect a man's character, nor does it protect him from many other consequences of a revelation of bad character, among which consequences must be counted the danger of professional discipline.

Our constitutional traditions have bred a deep respect for the protections given the citizen against the government by the Bill of Rights, and an appeal to those instincts strikes a responsive chord. Yet reflection demonstrates that, in respect of the right here claimed by appellant, the position of the attorney in respect of professional discipline differs from that of the citizen in respect of punishment for crime by means of prosecution or the imposition of penalties and forfeitures.

The liability of the citizen to prosecution for crime is not something voluntarily assumed by him; the attorney, on the other hand, voluntarily assumes the consequences of his office when he assumes the office.

A citizen can be punished only for the commission of specific proscribed *acts*. He cannot be punished because he bears a bad public repute. Yet one can be denied admission to the bar, and, after admission, can be disbarred, because one bears or has acquired a bad public character.

A citizen, once tried for a crime, cannot be subjected to double jeopardy by a second trial and a second punishment. Yet an attorney, tried and convicted for a crime, can be thereafter subjected to disciplinary proceedings and pun-

ishment by way of professional discipline for the same crime.

These consequences exist even though an attorney is not a second class citizen and does not lose his constitutional rights upon admission to the bar. On the contrary, they flow from the fact that an attorney is a first class citizen who has voluntarily assumed superior obligations in exchange for the grant of privileges not possessed by others.

The Supreme Court has prescribed certain constitutional protections in attorney-disciplinary proceedings. The attorney must have adequate notice of the charges (*In re Ruffalo, supra*). His exercise of the privilege against self-incrimination cannot be the basis for discipline (*Spevack* v. *Klein, supra*). The evidence on which a finding of bad character is made cannot be patently insufficient to support the finding (*Schware* v. *Board of Bar Examiners,* 353 U.S. 232 [1957]; *Konigsberg* v. *State Bar,* 353 U.S. 252 [1956]). An attorney cannot be disciplined by way of a bill of attainder or an *ex post facto* law (*Ex parte Garland, supra*). And it may be concluded from the case law that standards for admission and discipline could not be enforced which were racial or religious in character or which restricted First Amendment rights.

But these restrictions are completely consistent with the position here advanced: that a grant of immunity from the use of compelled testimony in a criminal prosecution does not prevent the professional discipline of the testifying attorney on the basis of the testimony.

An attorney is certified by the courts and by the state to the public, by means of his license, as competent and trustworthy to practice law. It is inconceivable that the

courts and the state must continue this certification in the case of an attorney who has demonstrated by his compelled testimony that he is not competent or trustworthy.*

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

SAUL FRIEDBERG
Attorney for Defendants-Appellees The Association of the Bar of the City of New York and John G. Bonomi
36 West 44th Street
New York, New York 10036

---

* To the extent that the Florida state case of *Lurie* v. *Florida State Board of Dentistry*, the opinion in which is annexed as an addendum to Appellant's Brief, and which deals with dentistry, not law, is contrary to the position here advanced, it is not controlling and is erroneous and should not be followed. One might well ask: if the compelled testimony given by the dentist indicated a complete inability to pursue the science, is the state bound to continue to certify him to the public as competent to fix teeth?

APPENDIX

APPENDIX TO BRIEF FOR DEFENDANTS-APPELLEES

(Necessary Statutes)

Judiciary Law of New York

Section 90.1 a. and b.

1. a. Upon the state board of law e aminers certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States, or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-

law, in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

Section 90.2 (in part)

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

Section 90.10

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the

presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

Section 478 (in part)

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state or in any court in the city of New York, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly

licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred sixty-eight of the judiciary law and filed the same in the office of the clerk of the court of appeals as required by said section.

Rules of the Appellate Division, First Department

Rule 603.12

Preliminary Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath

(a) Upon application by the chairman or acting chairman of the Committee on Grievances of the Association of the Bar of the City of New York, or the Committee on Discipline of the New York County Lawyers' Association, or the Committee on Grievances of the Bronx County Bar Association, or the Co-Ordinating Committee on Discipline, disclosing that such committee is conducting a preliminary investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and production of books and papers before such committee, or any subcommittee of such committee, designated in such application, at the time and place within the First Judicial Department that said committee, or subcommittee, regularly meets.

(b) Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 12th day of December 19 74, at 3 o'clock P.M. he served the annexed Brief for Defendants-Appellees, in RE: In The Matter of Anonymous, An Attorney v. The Assn. of the Bar of the City of New York, et al. No. 74-2183

upon Anderson, Russell, Kill & Olick, P.C.

Esq(s)., Attorney(s)

for Plaintif-Appellant

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

630 Fifth Avenue, New York, New York 10020

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 12th day of December 1974

Gladys J. Carty

GLADYS J. CARTY
NOTARY PUBLIC, State of New York
No. 24-0538175
Qualified in Kings County
Commission Expires March 30, 1975